

**The elusive test for unfair excessive pricing under EU law: revisiting *United Brands* in the light of *Competition and Markets Authority v Flynn Pharma Ltd***

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**Abstract**

The European Commission has historically proved relatively reluctant to intervene in the area of excessive pricing. This is probably partly because the test outlined in *United Brands v Commission* remains unclear in various respects. In a recent decision of the English Court of Appeal – *Competition and Markets Authority v Flynn Pharma* – the English court sought to revisit some of the problematic aspects of the *United Brands* test. While the decision places a useful light on the intrinsic problems with the test, it is argued that in certain respects the Court of Appeal’s reading is questionable and that significant uncertainties remain. In particular, the questions of what qualifies a price as being “unfair in itself” and how the economic value of a product should be assessed remain problematic. Until these issues are addressed more thoroughly by the EU courts, the enforcement of unfair excessive pricing will continue to prove problematic.

**Keywords**

Unfair pricing; excessive pricing; Article 102 TFEU; *United Brands*; *Flynn Pharma*.

## **Introduction**

Claims of opportunistic price rises in Europe as a result of the Coronavirus pandemic,<sup>1</sup> have seen the European Competition Network,<sup>2</sup> as well as some national regulators individually, issue warnings against parties seeking to engage in the abuse of excessive “unfair pricing”. For example, the Italian Regulator, the *Autorità Garante della Concorrenza e del Mercato*, recently warned: “the Authority will not hesitate to use all the powers at its disposal to act against companies that attempt to profit from the current situation, by way of anticompetitive agreements or by abusing their dominant position”.<sup>3</sup> However, although it is well established that excessive “unfair” pricing constitutes an abuse under EU competition law,<sup>4</sup> historically, the European Commission at least, has not taken an interventionist approach in this particular area, with infringement decisions in respect of excessive pricing being relatively few and far

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<sup>1</sup> See e.g. the Competition and Markets Authority recently reported that between 10 March and 19 April 2020 it had received almost 21,000 complaints about coronavirus-related issues and that one of the main issues of concern was “unjustifiable price increases, particularly for essential goods”. See: Competition and Markets Authority, ‘Protecting consumers during the coronavirus (COVID-19) pandemic: update on the work of the CMA’s Taskforce’, 24 April 2020 <<https://www.gov.uk/government/publications/protecting-consumers-during-the-coronavirus-covid-19-pandemic-update-on-the-work-of-the-cmas-taskforce/protecting-consumers-during-the-coronavirus-covid-19-pandemic-update-on-the-work-of-the-cmas-taskforce>> accessed 3 May 2020.

<sup>2</sup> European Competition Network, ‘Antitrust statement by the European Competition Network (ECN) on application of competition law during the Corona crisis’, 23 March 2020 <[https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf)> accessed 3 May 2020.

<sup>3</sup> Autorità Garante della Concorrenza e del Mercato, ‘Comunicazione dell’ Autorità Garante della Concorrenza e del Mercato sugli accordi di cooperazione e l’emergenza COVID-19’, 24 April 2020 <<https://www.agcm.it/media/dettaglio-notizia?id=2b88e620-408b-4444-b8bea45fa78f78b2&parent=News&parentUrl=/media/news>> accessed 3 May 2020 (author’s translation). See also e.g.: Competition and Markets Authority, ‘COVID-19: sales and pricing practices during Coronavirus outbreak’, 5 March 2020 <<https://www.gov.uk/government/news/covid-19-sales-and-pricing-practices-during-coronavirus-outbreak>> accessed 20 April 2020.

<sup>4</sup> Article 102(a) specifies that an abuse of a dominant position may consist in “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”.

between.<sup>5</sup> While various possible reasons for this have been suggested,<sup>6</sup> the reluctance of the Commission and other competition authorities to intervene in this area may, partly at least, be put down to the considerable uncertainty that remains over what, in practice, qualifies as an “unfairly” excessive price.

In this context, somewhat ironically perhaps, the aforesaid warnings of regulators have coincided with a decision of the English Court of Appeal in the case of *Competition and Markets Authority v Flynn Pharma Ltd and others*,<sup>7</sup> which attempts to shed light on the test for unfair excessive prices originally set out in the ECJ case of *United Brands v Commission*,<sup>8</sup> to an extent that arguably the ECJ itself has not done since the decision in *United Brands*. Indeed, reading the Court of Appeal’s decision – whatever its merits – is thought-provoking for the simple reason that it underlines how much doubt and room for interpretation still surrounds the practical application of a test originally set out by the ECJ over 40 years ago.

This article will seek to revisit the test set out in *United Brands*, how it has since been interpreted by the EU courts and how the Court of Appeal decision adds to the understanding of how the test for unfair excessive pricing should be applied in practice. It will be argued that as well as underlining some of the ambiguities of the test as framed in *United Brands*, the Court has made a decent attempt at clarifying certain aspects of the test. It will nonetheless be submitted that one of the court’s main conclusions on the fairness aspect of the test, whilst plausible, relies on a creative reading of a key paragraph of the *United Brands* judgment,

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<sup>5</sup> Among notable examples, however, see: *General Motors Continental* (Case IV/28.851) Commission Decision 75/75/EEC [1975] OJ L29/14; *Chiquita (United Brands)* (Case IV/26699) Commission Decision 76/353/EEC [1975] OJ L95/1; *British Leyland* (Case IV/30.615) Commission Decision 84/379/EEC [1984] OJ L207/11; *Deutsche Post AG* (Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L331/40; *Scandlines Sverige AB v Port of Helsingborg* (Case COMP/A.36.568/DE) [2006] 4 CMLR 1298; *Sundbusserne v Port of Helsingborg* (Case COMP/A.36.570/D3) unreported; *Standard & Poor’s* (Case COMP/39.592) [2011] OJ C31/8.

<sup>6</sup> In particular the argument that excessive pricing will tend to be counter-productive for those who engage in it in encouraging new entrants. For a good discussion of this theory and a critique of it see: A Ezrachi and D Gilo, ‘Are excessive prices really self-correcting?’ (2009) 5 *Journal of Competition Law & Economics* 249.

<sup>7</sup> [2020] EWCA Civ 339, 2017 WL 11508568.

<sup>8</sup> Case 27/76, *United Brands v Commission* [1978] ECR 207.

specifically paragraph 252, that is difficult to sustain. It will also be concluded that many of the questions raised by the *United Brands* test still remain unanswered and the most important of these questions shall be highlighted. In particular, it will be submitted that doubt remains over the “fairness” leg of the *United Brands* test. It will be argued that clarity on this is long overdue and that until such time as there is more clarity, the aforementioned warnings of competition authorities may have a rather hollow ring to them.

The article will begin by revisiting the test from *United Brands* and highlighting some of the intrinsic problems with the test before recapping some of the elaborations and interpretations that have been given to specific aspects of the test by the EU courts over the years. The background to the dispute in *Competition and Markets Authority v Flynn Pharma Ltd*<sup>9</sup> will then be set out and the court’s interpretation of the test from *United Brands* shall be critically discussed. It will be argued that the question of exactly how the test should be broken down as a whole and the interplay between its constituent parts remains unclear and that the Court of Appeal’s conclusion on the question of what constitutes a price that is so excessive as to be “unfair in itself” is problematic.

### **The test for unfairly excessive prices**

#### **The *United Brands* test**

The decision of the ECJ in the case of *United Brands v Commission*,<sup>10</sup> is generally considered to have set out the “test” for unfair excessive pricing at paragraphs 249 to 253, albeit that the abuse of unfair pricing had arisen before the court previously.<sup>11</sup>

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<sup>9</sup> *Flynn Pharma* (n 7).

<sup>10</sup> *United Brands* (n 8).

<sup>11</sup> Case 26/75, *General Motors v Commission* [1975] ECR 1367.

Paragraph 249 of *United Brands* appears to encapsulate the question underpinning the test:

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

The basic elements of the test itself are set out in paragraphs 250 to 253, with the test essentially consisting of two elements, one being whether the price is *excessive* and the other being whether the price is *unfair*. The excessive element is dealt with in paragraphs 250 and 251. Referring to the dispute before the court, the court states that “[i]n this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse”.<sup>12</sup>

Paragraph 251 sets out *one* possible way in which the “relation to the economic value of the product” could be assessed, namely:

...if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin.<sup>13</sup>

Paragraph 252 then clarifies the second element of the test, that is, once it has been ascertained that a price charged is excessive, “...whether a price has been imposed which is either unfair in itself or when compared to competing products”.<sup>14</sup>

While the test has been much discussed,<sup>15</sup> it is submitted that there are above all two fundamental problems with the way in which the test is expressed. Whereas the test

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<sup>12</sup> *United Brands* (n 8) [250]

<sup>13</sup> *ibid* [251]

<sup>14</sup> *ibid* [252].

<sup>15</sup> See *inter alia*: Mark Furse, ‘Excessive prices, unfair prices and economic value: the law of excessive pricing under article 82 EC and the Chapter II prohibition’ (2008) 4 *European Competition Journal* 59; P Akman & L

unquestionably sets out two requirements – one for *excessiveness* and one for *unfairness* – and has consistently been interpreted on that basis, the test confuses matters by, in the first instance, referring to the *excessiveness* of the price as an “abuse” – without any mention of a separate requirement for unfairness – and then implying that the *unfairness* aspect of the test has already been referred to in the part of the test ostensibly dealing with the *excessiveness* aspect. The first of these issues is succinctly explained by Lord Justice Green in *Competition and Markets Authority v Flynn Pharma Ltd*<sup>16</sup> as follows:

...the Court in paragraph [250] equates (without more) a price that is “*excessive*” with one that is abusive (cf “*would be such an abuse*”) but then (inconsistently) in paragraph [252] says that if a price is “*excessive*” that is not the end of the analysis since it must in addition be decided whether the price is fair by reference to the “*in itself*” or “*competing products*” tests.<sup>17</sup>

The second issue may in some respects be seen as the other side of the same coin. At paragraph 252 of *United Brands* it is stated that:

The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.<sup>18</sup>

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Garrod, ‘When Are Excessive Prices Unfair?’ (2011) 7 *Journal of Competition Law & Economics* 403; D Howarth, ‘Unfair and Predatory Pricing under Article 82 EC: From Cost-Price Comparisons to the Search for Strategic Standards’ in G Amato and C-D Ehlermann (eds), *EC Competition Law: A Critical Assessment* (Hart 2007); D Evans and J Padilla ‘Excessive Prices: Using Economics to Define Administrable Legal Rules’ (2005) 1 *Journal of Competition Law and Economics* 97; A Ezrachi and D Gilo, ‘Excessive pricing, entry, assessment, and investment: lessons from the *Mittal* litigation’ (2009) 76 *Antitrust Law Journal* 873.

<sup>16</sup> *Flynn Pharma* (n 7).

<sup>17</sup> *ibid* [66] (Green LJ).

<sup>18</sup> *United Brands* (n 8) [252].

The problematic word here is “*therefore*” because it suggests that the question of *unfairness* has already been addressed in the preceding paragraphs i.e. it follows from what precedes that there is a separate question as to the fairness of a price, whereas the preceding part of the test only appears to address *excessiveness*.

One possible explanation for these “problems” with the test, might be that a strict division of the test into two parts, namely the *excessiveness* aspect and the *unfairness* aspect amounts to an oversimplification. But it is submitted that such an interpretation of the test is the most logical and coherent one and is furthermore the widely accepted one. For example, one of the most comprehensive and methodical appraisals of the *United Brands* test was carried out by the Commission in its decision in *Scandlines Sverige v Port of Helsingborg*,<sup>19</sup> a dispute concerning the fees charged by the authority with responsibility for the Port of Helsingborg in Sweden to two ferry companies for gaining access to the port. There, the Commission asserted that the questions to be asked were first, “(i) whether the difference between the costs actually incurred and the price actually charged is excessive and, if the answer is in the affirmative; (ii) whether a price has been imposed which is either unfair in itself or when compared to the price of competing products”.<sup>20</sup>

On further comment on the excessiveness/unfairness demarcation should be added, however. This is, that the test in *United Brands* is legally the test for the abuse known as “unfair” pricing i.e. confusion may arise from the fact that *unfairness* is only one leg of the two-part test for “unfair” pricing. On the flip side, the abuse in question is often described generically as “excessive pricing”, which similarly obscures things, because the excessiveness of the price is just one leg of the two-leg *United Brands* test.

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<sup>19</sup> *Scandlines Sverige AB* (n 5).

<sup>20</sup> *ibid*, para 147.

Moving on from the potential problems with the *United Brands* test, however – some of which will be revisited later – it is suggested that the test can essentially be broken down as follows:

- For there to be unfair excessive pricing (in the sense of the abuse of “unfair pricing”) there would need to be a price which “...has no reasonable relation to the economic value of the product supplied”.
- One – but not the only way – that this could be assessed is by reference to the profit margin.
- But even where it *is* established that the price has no reasonable relation to the economic value of the product, the price has to be “unfair.”
- The price could be deemed to be unfair either “in itself” or when compared to competing products.

**Interpretations and applications of the *United Brands* test by the EU courts in music copyright cases**

Given the above-mentioned – and other – intrinsic ambiguities with the test set out in the *United Brands* case, it is curious that the test as a whole does not appear to have since been comprehensively analysed or revisited in any great detail by the EU courts. This can no doubt, partly at least, be put down to the relatively small number of Commission decisions relating to excessive pricing. The occasions on which the ECJ *has* been called on to give an opinion with regard to the application of the test for the most part comprise preliminary references from Member State courts, with a large proportion of the preliminary references relating to music copyright cases.<sup>21</sup> Specifically, these cases involve actions against organisations enjoying a

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<sup>21</sup> See in particular: Case 78-70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECR 487; Case 110/88 *François Lucazeau v Société des auteurs, compositeurs et éditeurs de musique*



dominant position in a specific Member State for the grant of intellectual property rights in musical works, in respect of the prices charged for access to the copyrighted material. While the extent to which actions involving such organisations dominate the case law may seem curious, this can probably be explained to a large extent by the difficulty in assessing the *economic value* of an intellectual property right.

In *François Lucazeau v Sacem*,<sup>22</sup> in response to a preliminary reference from a French court hearing a dispute between a group of nightclub operators and a society managing access to the copyright of musical works in France, the ECJ held that the fixed rate of 8.25% of turnover charged to the nightclubs in respect of royalties amounted to “unfair trading conditions”. This was on the basis that the charges were “...appreciably higher than those charged in other Member States...”<sup>23</sup> by the equivalent copyright managing societies in those Member States. In a dispute involving another nightclub and the same copyright management society (SACEM),<sup>24</sup> the ECJ held that although a significant difference in fees from those charged by equivalent organisations in other Member States “...must be regarded as indicative of an abuse of a dominant position”, such an assumption could be rebutted “...by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States”.<sup>25</sup>

In a more recent case,<sup>26</sup> this time involving a preliminary reference in an action by a private health centre against an organisation managing the copyright to musical works in the Czech Republic, the court reiterated the principle that where an organisation collecting and

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(SACEM) [1989] ECR 2811; Case C-395/87 *Ministère public v Jean-Louis Tournier* [1989] ECR 2521; Case C-52/07 *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa* [2008] ECR I-9275; C-351/12, *OSA v Léčebné lázně Mariánské Lázně a.s.*, ECLI:EU:C:2014:110; Case C-177/16, *Akka-Laa v Konkurences padome*, ECLI:EU:C:2017:689.

<sup>22</sup> *François Lucazeau* (n 21).

<sup>23</sup> *ibid*, para 33.

<sup>24</sup> *Tournier* (n 21).

<sup>25</sup> *ibid*, para 38.

<sup>26</sup> *OSA* (n 21).

administering the copyright to musical works enjoys a dominant position in a particular Member State and charges prices that are “...appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of dominant position within the meaning of Article 102 TFEU”.<sup>27</sup> It was for the collecting society “...to justify the difference by reference to objective similarities between the situation in the Member State concerned and the situation prevailing in all the other Member States”.<sup>28</sup>

The most recent preliminary reference in this category of cases came in *Akka-Laa v Konkurences Padome*,<sup>29</sup> which emanated from proceedings involving the Latvian competition regulator and the organisation managing access to musical copyright in Latvia (the AKKA/LAA). Here, the ECJ was called upon to consider a total of 7 questions in total. *Inter alia* the ECJ held that using the charges applied in neighbouring Member States (specifically Lithuania and Estonia) – rather than other Member States more generally – for the equivalent type of copyright access could represent an “appropriate and sufficient” point of comparison for determining if the prices in question were excessive “...on condition....that the reference Member States are selected in accordance with objective, appropriate and verifiable criteria.”<sup>30</sup> Another question concerned at what point a difference between prices charged and the prices used as a point of comparison would be considered “appreciable” such as to put the onus on “..the economic operator enjoying a dominant position to demonstrate that its rates are fair?”<sup>31</sup> In response, the court held that “[t]here is in fact no minimum threshold above which a rate must be regarded as “appreciably higher”, given that the circumstances specific to each case are decisive in that regard”.<sup>32</sup> The court only added that “...a difference between rates may be

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<sup>27</sup> *ibid*, para 87.

<sup>28</sup> *ibid*, para 87.

<sup>29</sup> *Akka-Laa* (n 21).

<sup>30</sup> *ibid*, para 41.

<sup>31</sup> *ibid*, para 24.

<sup>32</sup> *ibid*, para 55.

qualified as “appreciable” if it is both significant and persistent on the facts, with respect, in particular, to the market in question, this being a matter for the referring court to verify”.<sup>33</sup> On a third question of what a party would have to do to justify the apparent difference in the prices charged by that party and that charged in other Member States, the court explained that “[i]t may be possible for the copyright management organisation to justify the difference by relying on objective dissimilarities between the situation of the Member State concerned and that of the other Member States...”.<sup>34</sup> In the case of the type of situation in question, the “...relationship between the level of the fee and the amount actually paid to the rightholders” could be an important factor.<sup>35</sup>

### **Other significant ECJ judgments**

Despite the prevalence of musical copyright cases, preliminary references have arisen in relation to other situations of alleged excessive pricing. *Corinne Bodson v SA Pompes funèbres des régions libérées*,<sup>36</sup> concerned an alleged abuse of a dominant position by a group of companies with concessions to provide various funeral services for thousands of French communes, comprising a significant proportion of the population. When addressing how it could be assessed whether the prices charged by the concession holders were excessive, the court suggested a comparison between “...the prices charged by the group of undertakings which hold concessions and prices charged elsewhere”, referring to the over 30,000 communes in France that had not granted a concession to the group of companies in question. The court

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<sup>33</sup> *ibid*, para 55.

<sup>34</sup> *ibid*, para 57.

<sup>35</sup> *ibid*, para 58. For yet another judgment in this area see *Kanal 5* (n 21).

<sup>36</sup> Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1998] ECR-2479.

stated that “[s]uch a comparison could provide a basis for assessing whether or not the prices charged by the concession holders are fair”.<sup>37</sup>

The decision of the ECJ in *Scippacercola v Commission*,<sup>38</sup> an appeal from a judgment of the Court of First Instance upholding a decision of the Commission that the owners of Athens Airport had not *inter alia* engaged in excessive pricing, only addressed the *United Brands* test fairly briefly. Nonetheless, the court’s rejection of the appellants’ argument as to the assessment of an unfair price to be carried out under paragraph 252 of *United Brands* is significant. Specifically, referring to the question of whether a price is “unfair in itself” or “unfair by comparison with competing products”, the court rejected the suggestion that the “examination of the unfair price must be based on a cumulative application of those criteria, and in the order suggested by the appellants...”.<sup>39</sup> As will be seen below, this was a point that was revisited in some detail in *CMA v Flynn Pharma*.

For the most part, then, it can be seen from the foregoing brief overview of ECJ judgments on excessive pricing, that these have tended to focus on the second aspect of the “fairness” leg of the *United Brands* test in specific contexts. That is to say, what a price being charged by a dominant undertaking should be “benchmarked” against in terms of the prices of “competing products.” The relationship between the two aspects of the “fairness” leg of the test i.e. the “unfair in itself” and the “competing products” aspects has not specifically been addressed but was a significant point of contention in *CMA v Flynn Pharma*.

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<sup>37</sup> *ibid.*

<sup>38</sup> Case C-159/08P *Scippacercola and Terezakis v Commission* ECLI:EU:C:2009:188.

<sup>39</sup> *ibid.*, para 47.

### **Key questions that remain with regard to the *United Brands* test**

Following the above discussion of the *United Brands* test and the main case law of the ECJ in this area and before the decision of the Court of Appeal in *Flynn Pharma* is considered, it is suggested that some of the most important questions with regard to the *United Brands* could be summarised as follows:

#### Excessiveness

- In terms of *excessiveness*, what type of profit margin (in terms of the methodology set out in paragraph 251 of *United Brands*) will be classified as excessive?
- In cases where the cost/plus methodology set out in paragraph 251 of *United Brands* is not possible or appropriate, what alternative strategies might be used for assessing the excessiveness of the price?
- In particular, how is the *economic value* of a product to be assessed where a cost/plus methodology is inappropriate or irrelevant (the aforementioned music copyright cases being a case in point)?

#### Unfairness

- Assuming a price is deemed to be *excessive*, under what circumstances will a price be deemed to be “*unfair in itself*” in terms of paragraph 252 of *United Brands*?
- When the price is not deemed to be “*unfair in itself*” what constitutes “competing products” and how rigorous does any analysis with competing products need to be?
- Finally, what other methods may be used to assess the potential “unfairness” of the price, as envisaged in paragraph 253 of *United Brands*?

It is not suggested that these questions can be answered exhaustively. For example, the court in *United Brands* did not suggest that there was an exhaustive list of alternatives to comparing

the price of a product with competing products to assess fairness. But it is submitted that these are some of the main questions that the *United Brands* test raises.

While the Court of Appeal in *CMA v Flynn Pharma Ltd* was not called upon to address all of these points, it did nonetheless discuss the *United Brands* test at some length and more comprehensively than any of the aforementioned ECJ decisions.

### **CMA v Flynn Pharma Ltd**

The appeal in *CMA v Flynn Pharma Ltd*<sup>40</sup> concerned proceedings by the UK Regulator against two pharmaceuticals groups, Flynn Pharma and Pfizer, with regard to alleged unfair excessive pricing – under both Article 102 TFEU and the UK Competition Act 1998 Chapter II prohibition – for an anti-epileptic drug, phenytoin sodium. Under the CMA’s infringement decision of 7 December 2016,<sup>41</sup> fines of approximately £84.2 million and £5.16 million were imposed on Pfizer and Flynn Pharma respectively. Essentially the infringement related to prices charged by the Pfizer group to the Flynn Pharma group and in turn by Flynn Pharma group primarily to the Department of Health. The Court of Appeal decision concerned appeals on various points of law, brought by parties on both sides of the dispute, against an initial appeal against the CMA’s infringement decision to the Competition Appeal Tribunal,<sup>42</sup> in which the CAT had found that the CMA had erred in law in respect of the test to be applied in excessive pricing cases.

Whilst neither the factual details of the dispute nor indeed the precise details of all the grounds of appeal need concern us greatly, the key significance of the case lies in its quite detailed

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<sup>40</sup> (n 7)

<sup>41</sup> Decision of the CMA of 7 December 2016: Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK, Case CE/9742-13.

<sup>42</sup> *Pfizer Inc. and Pfizer Limited v Competition and Markets Authority* [2018] CAT 11.

consideration of specific aspects of the *United Brands* test, which perhaps explains in large part why the Commission was a party to the proceedings as an intervener.

It is submitted that beyond the conclusions that the court drew on specific aspects of the *United Brands* test, some of the observations and questions asked by the court along the way help to shed light on certain difficulties and unanswered questions in respect of the *United Brands* test, if not to provide answers to those questions. Equally, some of the Court of Appeal's findings on the *United Brands* test will be questioned and even challenged, below.

### ***Whether the “in itself” test and the “competing products” test are true alternatives***

It was suggested above that one of the many unanswered questions that remains with regard to the *United Brands* test is what constitutes a price that is “unfair in itself”. This was a point that came up in relation to the first ground of appeal in *Flynn Pharma* and specifically the demarcation between a price that is “unfair in itself” and one that is unfair by comparison to “competing products”. The crux of the issue was succinctly expressed by Lord Justice Green, who gave the main judgment, as follows:

“...the core question arising concerned the correctness of the position adopted by the CMA to the effect that the “*in itself*” and “*competing products*” tests were “*true alternatives*” in the sense that if the CMA relied upon one alternative to find abuse then it had no obligation in law to evaluate other prima facie evidence that prices were fair adduced by a defendant undertaking.”<sup>43</sup>

When providing his initial distillation of the *United Brands* test, Green LJ agreed with the observation in the case of *Attheraces Limited v British Horseracing Board*<sup>44</sup> that “...it would

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<sup>43</sup> (n 7) [117] (Green LJ)

<sup>44</sup> [2007] EWCA Civ 38 (at paragraph [115])

be wrong to read this passage too literally” and that it had to be read “contextually and not over-rigidly”.<sup>45</sup> It is submitted that however one might interpret the *United Brands* test – in particular paragraphs 249-252 – as the earlier discussion suggests, this assessment is something that would be difficult to disagree with. The test is expressed ambiguously and any attempt to derive an unequivocal literal meaning will likely prove futile. Nonetheless, it is respectfully submitted that the way the test is classified by Green LJ is strange.<sup>46</sup> Whereas he appears to make a division between paragraphs [249] and [250] on the one part and [251] and [252] on the other, with the latter two paragraphs being described as explaining “...how in evidential and methodological terms such an abuse can be ‘*determined objectively*’”, it is submitted that a more natural interpretation would be to characterise paragraphs 249 to 251 being essentially on the *excessiveness* aspect and paragraph 252 introducing the further requirement of *unfairness*. Such a distillation would accord with the above-mentioned analysis of the Commission in *Scandlines Sverige*.<sup>47</sup> Given the ambiguity of paragraphs 249-252 of *United Brands*, however, this is probably not a point worth dwelling on.

Green LJ then goes on to examine ECJ and UK judgments that address the *United Brands* test. This then culminates in a non-exhaustive summary by Green LJ of some of the main principles that competition authorities should apply when employing the *United Brands* test.<sup>48</sup> One general point that Green LJ makes on the test – that is difficult to argue with – is that “[t]here is no single method or “way” in which abuse might be established and competition authorities have a margin of manoeuvre or appreciation in deciding which methodology to use and which evidence to rely upon”.<sup>49</sup> But as to the question of whether the “unfair in itself” and “competing products” tests were true alternatives, Green LJ was unconvinced holding that “...the reading

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<sup>45</sup> (n 7) [64] (Green LJ).

<sup>46</sup> *ibid* [60]-[64] (Green LJ).

<sup>47</sup> *Scandlines Sverige AB* (n 5).

<sup>48</sup> (n 7) [97].

<sup>49</sup> *ibid* [97] (Green LJ).



of the test in *United Brands* by the CMA is unduly rigid and literal and invests far too much significance in the disjunctive “or” in paragraph [252]”.<sup>50</sup> Specifically, the court held *inter alia* that the *United Brands* judgment itself did not support such a reading of the test,<sup>51</sup>

One of the most revealing parts of Lord Justice Green’s reasoning on this question can be seen in his consideration of the CMA’s attempt to draw an analogy between the “unfair in itself” and “competing products” test on the one hand and the object/effect distinction made with regard to anticompetitive agreements under Article 101 TFEU.<sup>52</sup> Green LJ rejected the analogy on a number of grounds, including that the object/effect distinction in Article 101 is treaty based and that it is aimed at enabling competition authorities to take action pre-emptively to prevent cartels, which have as their object the restriction of competition.<sup>53</sup> He then stated that “...the phrases ‘*in itself*’ and ‘*competing products*’ do not lend themselves to clear lines of demarcation, a point highlighted by the facts of the present case”,<sup>54</sup> adding that “[t]hey are loose terms and not economically recognised terms of art which could stand as genuine economic alternatives”.<sup>55</sup>

While it may be correct that these are not intended as terms of art – and that the object/effect analogy is indeed unhelpful – it is submitted that the way that Green LJ then plays down the “unfair in itself” and “competing products” distinction can be seen as problematic. The essence of Lord Justice Green’s position seems to be based on the premise that even if a competition authority was *prima facie* satisfied that a price was unfair “in itself”, it would still be duty bound to consider evidence presented to a competition authority that might justify the charging

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<sup>50</sup> *ibid* [57] (Green LJ).

<sup>51</sup> *ibid* [68]-[70].

<sup>52</sup> *ibid* [108].

<sup>53</sup> *ibid* [108].

<sup>54</sup> *ibid* [108] (Green LJ).

<sup>55</sup> *ibid* [108] (Green LJ).

of such a price i.e. “unfair in itself” can never mean more than a price that is *prima facie* unfair in itself and is not rebutted by contrary evidence.

Sir Geoffrey Vos was even more emphatic in his view on this point, asserting that:

It, therefore, seems to me that the question of whether the choice between the two limbs of the unfairness test adumbrated in *United Brands* is a binary one, is an academic and irrelevant one....I take the view that the competition authority will always need, at least as part of its duty of good administration, to give some consideration to *prima facie* valid comparators advanced evidentially by the undertakings. This is so whether or not the CMA chooses to proceed eventually under the “unfair in itself” alternative of the unfairness test.<sup>56</sup>

While the court’s reading of paragraph 252 of *United Brands* may be plausible, it is submitted that – whether or not it is correct – it is not a natural reading of the paragraph, in that it implies that there is not truly such a thing as a price that is “unfair in itself”, which then begs the question why the apparent distinction in paragraph 252 of *United Brands* was made at all?

When Sir Geoffrey Vos dismisses any characterisation of the two limbs of the unfairness test as being strict alternatives as “an academic and irrelevant one”, he may be right insofar as where competition authorities are presented with evidence – by way of comparators or otherwise – that purports to justify the level of an otherwise “unfair price”, they are unlikely in practice to ignore, or to be entitled to ignore, such evidence. Furthermore, in cases where a price is alleged to be unfairly excessive, it would be an unusual situation where the party charged with excessive pricing would not present at least some evidence to the relevant competition authority purporting to justify the “fairness” of the price. It can also be pointed out in support of the court’s position that *if* there is indeed such a thing as a price which is

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<sup>56</sup> *ibid* [260] (Sir Geoffrey Vos).

intrinsically unfair, the EU courts do not appear to have ever set out what qualitatively classifies a price as “unfair in itself”. Nonetheless, until the EU courts specifically address this issue, the suspicion must remain that the distinction in paragraph 252 of *United Brands* is more than just “academic” and that there could be circumstances where a price really is by its very nature “unfair in itself.”

There is also a further potentially problematic point here. Imagine the alleged price has been deemed to be excessive on a cost-plus basis and seems inherently unfair based on the sheer level of the mark-up. Imagine then that the price is benchmarked against “competing products” and it turns out those competing products are priced at a similar level. In such a case, *not* treating the original price as outright “unfair in itself” may actually lead to the price being wrongly being deemed to be “fair” by reference to comparator prices that are similarly “unfair in themselves”.

### ***No need for a hypothetical benchmark price***

The second ground of appeal was the only one of the five that was allowed by the court. Here the court rejected the CAT’s finding that a competition authority should – as part of the analysis of unfair pricing – come up with a hypothetical benchmark price against which to measure the prices actually charged. Indeed, the Court of Appeal gave such a suggestion fairly short shrift. While Green LJ accepted that “[t]he need for *a* comparator is economically logical since the concepts of fairness, excessiveness and reasonableness are all relative concepts”<sup>57</sup> he equally noted that “...there are numerous counterfactuals which might be used...”<sup>58</sup> and consequently “...in the first instance at least, the choice of benchmark is for the competition authority...”<sup>59</sup>

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<sup>57</sup> *ibid* [122].

<sup>58</sup> *ibid* [122].

<sup>59</sup> *ibid* [125].

and could be based on various benchmarks as long as they were “...capable of providing a ‘sufficient’ indication that the prices charged are excessive and unfair”.<sup>60</sup> It is submitted that the court’s decision to accept this ground of appeal is logical, fundamentally because there is little within the case law to support the need for a hypothetical benchmark price.

### ***The meaning of economic value?***

In terms of the interpretation and analysis of the *United Brands* test, the fourth ground of appeal is – along with the first ground of appeal – the part of the judgment of most interest, as this ground of appeal approached one of the questions that was raised above in relation to the *United Brands* test, namely the meaning of “economic value” as referred to in paragraph 250 of *United Brands*. The dispute in *Flynn Pharma* related to whether, in a situation where consumers were dependant on a particular drug, there could still be some economic value attributed to the product on the demand side. The court held that there could. Green LJ maintained that “[e]conomic common sense indicates that dependency and the inferences to be drawn from its existence are...matters of fact and degree”<sup>61</sup> and that even in a situation of dependency “...there might still be *some* economic value but not necessarily reflecting the full price demanded”.<sup>62</sup>

While rejecting the ground of appeal, the court did nonetheless question some of the CAT’s analysis of the matter. On the CAT’s description of the test of economic value, Green LJ held that although it is a legal test “...in the strictly limited sense that it has been ascribed a meaning in a court judgment...”,<sup>63</sup> it is essentially “...an economic concept which describes what it is that users and customers value and will reasonably pay for...”.<sup>64</sup> Green LJ also agreed with the

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<sup>60</sup> *ibid* [125].

<sup>61</sup> *ibid* [167] (Green LJ).

<sup>62</sup> *ibid* [167] (Green LJ).

<sup>63</sup> *ibid* [171] (Green LJ).

<sup>64</sup> *ibid* [171] (Green LJ).

parties that “economic value” in terms of *United Brands* is “...part of the overall descriptor of the abuse; it is not the test”.<sup>65</sup> Consequently the issue of economic value could be taken into account in relation to various aspects of the test, such as “the Plus element of Cost-Plus”<sup>66</sup>, the “fairness element”<sup>67</sup> or in the analysis of comparator markets.<sup>68</sup> Summing up his view, Green LJ states:

In short, economic value needs to be factored in and fairly evaluated, *somewhere*, but it is properly a matter which falls to the judgment of the competition authority as to where in the analysis this occurs.<sup>69</sup>

This analysis brings us back to one of the ambiguous aspects of the *United Brands* test discussed earlier, namely, whether paragraph 250 of *United Brands* refers only to the “excessive” element of the test or to the test more generally. It was noted that the words “...would be such an abuse” at the end of the paragraph were the source of the confusion. Green LJ’s analysis certainly views the question of economic value as a principle that underpins the whole test rather than a specific part of the test in itself.

The truth is, this is an area of the judgment that more than anything highlights another ambiguity in the *United Brands* test: what exactly does economic value mean and how is it to be assessed? Of course, in the case of incorporeal property, such as intellectual property rights, attaching an “objective” economic value to a right held by a party enjoying a monopoly, or near monopoly position, is intrinsically difficult, because the price a party is willing to pay for that right may offer very little indication of what the price would be in a competitive market. It is for this reason that, as discussed earlier, much of the EU case law in this area concerns this

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<sup>65</sup> *ibid* [172] (Green LJ).

<sup>66</sup> *ibid* [172].

<sup>67</sup> *ibid* [172].

<sup>68</sup> *ibid* [172].

<sup>69</sup> *ibid* [172] (Green LJ).

very question in relation to the rights to music copyright. But even in cases where economic value can be assessed by reference to the cost of production of a product, doubt subsists as to the level at which the price of a product unreasonably exceeds its economic value. This is surely an area which calls for greater clarification.<sup>70</sup>

### ***Other grounds of appeal***

The other two grounds of appeal do not have direct relevance to the analysis or application of the *United Brands* case and are more concerned with procedural or jurisdictional matters. In terms of the third ground of appeal, the Court of Appeal considered whether the CAT had acted outside its jurisdiction in considering the adequacy of the analysis that the CMA had carried out of “competing products” in terms of paragraph 252 of *United Brands*. In the event it was held that the Tribunal had not acted outside its jurisdiction. The fifth ground of appeal challenged two further apparent findings of the CAT, the concern being that such findings would be binding upon the CMA upon remittal of the decision to the CMA.<sup>71</sup> However, this ground of appeal was rejected on the basis that the Tribunal had remitted “...the entire issue of abuse to the CMA and did not intend any of its findings, howsoever expressed, to be binding upon that remittal”.<sup>72</sup>

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<sup>70</sup> For an overview on the assessment of excessive pricing in the pharmaceutical sector see: Organisation for Economic Co-operation and Development, ‘Excessive Prices in Pharmaceutical Markets’ 27-28 November 2018 <[https://one.oecd.org/document/DAF/COMP\(2018\)12/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)12/en/pdf)> accessed 4 May 2020.

<sup>71</sup> *ibid* [174] and [175].

<sup>72</sup> *ibid* [178] (Green LJ).

### **The test for unfair excessive pricing in the light of *Flynn***

Given that the decision of the Court of Appeal in *Flynn Pharma* is ultimately merely the decision of a national court and furthermore a decision of a national court of a state that is no longer a member of the European Union, its legal significance beyond the shores of the UK would have been limited whatever the outcome. Nonetheless, the decision will – assuming it is not overturned – remain of interest in terms of its exploration of the test for unfair excessive pricing set out in *United Brands*. But it is submitted that the decision first and foremost simply re-emphasises the vagueness of the *United Brands* test and the significant questions that remain unanswered from that case, regardless of the answers that the court purports to have come up with to some of those questions – some of which have been questioned here.

It was at the outset of this article pointed out that various regulators have issued warnings about excessive pricing in the context of the Coronavirus outbreak in Europe.<sup>73</sup> But given the hesitancy of regulators to intervene in this area in the past, there must be doubt as to whether the regulators' threats will amount to much. It should also be pointed out that price rises in the COVID 19 context appear to relate to supply shortages and spikes in demand rather than abuses of dominance *per se*. As such, the pricing in question – excessive though it may be – may not be easily characterised as “unfairly” excessive in terms of Article 102 TFEU.

It may of course be the case that the aforesaid warnings of regulators suggest that those regulators would advocate a more interventionist policy on excessive pricing than has been adopted by the Commission in the past. As to *why* excessive pricing cases – on the part of the Commission at any rate – seem so rare, there would appear to be two obvious possible explanations. One is the possibility that excessive pricing is not in fact a particularly prevalent issue on the basis that it soon enough proves counter-productive for those that engage in it. The

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<sup>73</sup> (n 2 & 3).

other, is that there remains a great deal of uncertainty as to what really constitutes unfairly excessive pricing in reality. Given the significant questions that remain from the *United Brands* test, the latter possibility must be taken seriously. Key questions that remain include: is there such a thing as a price that is “unfair in itself” on a cost-plus basis? If so, what must the mark-up be? Additionally, how does economic value fit in to the test? Until these questions receive more conclusive answers, the abuse of unfairly excessive pricing is likely to remain a sphere in which – when push comes to shove – regulators are reluctant to get involved in, due to lack of legal certainty.

## **Conclusions**

This article has sought to reconsider the test for excessive unfair pricing under EU law as outlined in the case of *United Brands v Commission*, with a particular focus of the recent consideration of the test by the UK Court of Appeal in *CMA v Flynn Pharma Ltd*. It was submitted that the test set out in *United Brands* was vague in a number of respects and that subsequent judgments of the EU courts have done little to provide greater clarity. In this context the decision of the Court of Appeal in *Flynn Pharma* is of interest because it carries out quite a detailed appraisal of the *United Brands* test. It was submitted, however, that most of the key questions posed with regard to the *United Brands* test remain unanswered. On the important question of what constitutes an excessive price which is “unfair in itself” it was suggested that the analysis of the Court of Appeal is problematic, while the question of how economic value is to be assessed remains an open one. Until such time as these questions are answered more comprehensively, the abuse of unfair excessive pricing is likely to continue to prove a difficult area for regulators to involve themselves in.



**Disclosure statement**

No potential conflict of interest was reported by the author.