ARTICLE 102 TFEU AS A TOOL FOR MARKET REGULATION: “EXCESSIVE ENFORCEMENT” AGAINST “EXCESSIVE PRICES” IN THE NEW EU MEMBER STATES AND CANDIDATE COUNTRIES

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A. INTRODUCTION

Every student attending classes on EU competition law learns that Article 102 TFEU sanctions two categories of abuses: exploitative and exclusionary. However, every student also learns that the existing case law on the first type of unilateral practices is quite limited in comparison to the second category of abuses. Even though the Court of Justice of the European Union (CJEU) has recognised that excessive prices and unfair contract terms can be sanctioned under Article 102(a) TFEU,1 the European Commission has primarily targeted exclusionary practices.2 As a consequence, the category of exploitative abuses has largely remained confined to the textbooks of EU competition law.

During the last 20 years, the EU Commission has requested EU candidate countries in Central and Eastern Europe (CEE),3 and more recently in South-East Europe,4 to adopt a national competition law which “mirrored” the EU competition rules, as well as to establish a National Competition

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2 The Commission has adopted only four decisions sanctioning exploitative abuses: (i) General Motors [1974] OJ L29/14; (ii) United Brands [1975] OJ L95/1; (iii) 84/379/ECC British Leyland [1984] OJ L207/11; and (iv) Deutsche Post II [2001] OJ L331/40. With the exception of British Leyland, these decisions were annulled by the CJEU or the General Court (GC).
3 In relation to the introduction of competition law in CEE countries see M Ottoja, The Competition Law of Central and Eastern Europe (Sweet & Maxwell, 1999); D Gerardin and D Henry, “Competition Law in the New Member States—Where Do We Come From? Where Do We Go?” in D Gerardin and D Henry (eds), Modernisation and Enlargement: Two Major Challenges for EC Competition Law (Intersentia, 2005).
Authorities (NCAs) to enforce this legislation. Similarly, the EU Commission has also promoted the EU competition model among its neighbours within the European Neighbouring Policy (ENP). The fact that new EU Member States and candidate countries adopted national competition laws which mirrored the EU substantive provisions does not prevent the NCAs of these countries from having different enforcement priorities from the EU Commission. In particular, Wahl has noted that, following the decentralisation of competition law enforcement, a number of NCAs in the new EU Member States and candidate countries would be “more eager” than the EU Commission to sanction exploitative conducts.

Due to the long history of price regulation, in fact, the general public in these countries often perceives competition rules as a mechanism to restrain the excessive profits of dominant companies. Furthermore, the prosecution of excessive pricing might also serve the publicity objectives of the newly established NCAs. The latter often do not have the resources or the experience to investigate and collect evidence against complex competition infringements, such as cartels or exclusionary abuses. Sanctioning the excessive pricing may thus represent an “enforcement shortcut”, which allows the NCA to show concrete enforcement results in its annual report. Finally, the deficiencies of the regulatory frameworks in the liberalised network industries (e.g., energy, telecoms and other utilities) might have led to the increasing interventions of the NCAs in these sectors.

The hypothesis that the NCAs of the new EU Member States and candidate countries might be more “eager” than the EU Commission to sanction excessive

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6 Nihl Wahl, judge of the GC, pointed out that “with the 2004 reform of the competition rules it would seem fair to envisage a more extensive national application of the Community competition rules, which in turn could lead to an increase in the application of Article 82 to exploitative abuses” N Wahl, “Exploitative High Prices and European Competition Law—a Personal Reflection” in Konkurrensvetet (Swedish Competition Authority), The Pros and Cons of High Prices (Lenanders Grafi ka, 2007), 47, available at http://www.kkv.se/upload/filtryckskerrapporter/pros&cons/rap_pros_and_cons_high_prices.pdf (last accessed on 13 July 2012).

7 Ibid.


pricing under the corresponding national provisions of Article 102 TFEU has never been proved by any empirical evidence. The current paper aims at filling this gap by analysing the degree of enforcement against excessive prices by the NCAs and the courts of a selected number of jurisdictions. In particular, new EU Member States (Bulgaria and Romania), candidate countries (Croatia, Macedonia, Montenegro and Serbia), potential candidates (Albania, Bosnia and Herzegovina) and countries included into the ENP (Moldova, Ukraine) were included in this study. For the purposes of this empirical analysis, we have selected 38 NCA decisions concerning investigations of excessive or unfair pricing adopted during the last 10 years in the selected jurisdictions. It should be noted that the list of the selected decisions is not exhaustive. Nevertheless, these decisions illustrate the patterns of enforcement against excessive prices in the target countries. Instead of reviewing the enforcement patterns in each of the selected jurisdictions, we have conducted a cross-country analysis, focusing on the following five issues: (i) economic sectors where excessive pricing has been sanctioned by the NCAs; (ii) substantive tests applied by the NCAs to determine that particular prices were excessive; (iii) remedies applied by the NCAs; (iv) the presence and role of judicial review; and (v) the presence and role of a National Regulatory Authority (NRA). The Annex at the end of this paper provides a systematic overview of the decisions analysed in the present work.

The cross-country comparison aims at verifying the hypothesis that the NCAs of the new EU Member States and candidate countries have been more eager than the EU Commission to sanction excessive pricing. In particular, the paper aims to demonstrate that this is a common trend, which characterises

10 Croatia is an acceding country. The EU and Croatia signed Croatia’s EU Accession Treaty on 9 December 2011. Subject to ratification of the Treaty by all the Member States and Croatia, Croatia will become the EU’s 28th Member State on 1 July 2013. See http://ec.europa.eu/enlargement/acceding-country/croatia/relations/index_en.htm (last accessed on 30 August 2012).
the selected jurisdictions independently of their “EU status” (ie Member States, candidates, neighbours). In particular, the paper aims at identifying common enforcement trends in relation to the five issues mentioned above.

In order to place this comparative study in the EU context, the paper starts with a historical overview of the objectives that the EU founding fathers had in mind when drafting Article 102 TFEU. Secondly, it provides an overview of the diverging methodology developed in economic scholarship and competition enforcement practice for determining when the price should be considered excessive. Finally, the paper conducts a cross-country comparison of the most relevant decisions adopted by the NCAs of the selected jurisdictions sanctioning excessive pricing.

B. EXCESSIVE PRICES IN EU COMPETITION LAW

1. The Initial Focus on the Exploitative Abuses

The expression “abuse of dominance” is usually considered a synonym of the anti-competitive practices that a dominant company employs in order to preserve and/or strengthen its dominance.15 Article 102 TFEU contains a list of abusive practices, which has been continuously expanded by the CJEU.16 Although the CJEU has recognised that the list of abuses mentioned in Article 102 TFEU is not exhaustive,17 one should note that these abuses have mainly an exploitative rather than an exclusionary character. In particular, this provision of the Treaty sanctions the dominant undertakings which either impose “unfair” sale or purchase prices or “unfair” contractual conditions,18 limit the production or technological development “to the prejudice of the final consumers”,19 or oblige the purchaser to accept “supplementary obligations” not related to the object of the contract.20 These types of abuse appear distant from the modern notion of exclusionary abuse of dominance, as they refer to the harm to customers of the dominant firm, rather than to its competitors. The concept of “unfair price” mentioned in Article 102(a) TFEU may refer

16 Art 102 TFEU does not expressly refer to predatory prices, tying, bundling, or refusal to deal or to grant access to an essential facility; such concepts have been introduced by the CJEU’s case law, which has progressively expanded the categories of business practices which can be sanctioned as exclusionary conduct under Art 102 TFEU.
18 Art 102(a) TFEU.
19 Art 102(b) TFEU.
20 Art 102(d) TFEU.
both to prices which are “too low” (i.e. exclusionary predatory prices) and to prices which are “too high” to be fair (i.e. exploitative excessive prices). However, the European Commission has concentrated its enforcement actions only on the second type of “unfair prices”.21

The analysis of travaux préparatoires of the Treaty of Rome has recently prompted some authors to conclude that its drafters were convinced that Article 102 TFEU should sanction primarily exploitative abuses which directly hamper the consumer welfare.22 The emphasis on exploitative abuses in Article 102 TFEU could be explained by the fact that in the 1950s most of the prices for basic commodities in Western Europe were still regulated by the state.23 The wording of Article 102 TFEU was also influenced by the price control introduced in the European Coal and Steel Community (ECSC) Treaty, which granted the ECSC Commission the power to directly regulate prices in the coal and steel markets, when they were considered to be excessive.24 Since the EU Commission did not adopt any decision under Article 102 TFEU during the immediate years following the entry into force of the Treaty of Rome, the meaning of the provision remained “obscure” and initially led some authors to argue that Article 102 TFEU was aimed exclusively at sanctioning exploitative conducts which could harm final consumers.25 The turning point in the interpretation of the objectives of Article 102 TFEU took place when the CJEU in Continental Can recognised that Article 102 TFEU could sanction exclusionary abuses of dominance as well.26 In particular, in Continental Can, the CJEU clarified that Article 102 TFEU had to be interpreted with a view of the overriding purpose of safeguarding a system of “undistorted competition” within the common market.27 Exclusionary practices thus fell within the scope of the application of Article 102 TFEU: by excluding its competitors, the dominant company “partitioned” the EU common market. The CJEU’s line of reasoning expressed in Continental Can has influenced the enforcement of

21 Supra n 2.
26 “Article 86 (now Article 102 TFEU) . . . is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such is mentioned in Article 3(F) of the Treaty.” Supra n 17, para 26.
Article 102 TFEU in the subsequent decades. In particular, even in its recent case law, the CJEU still recognises that the main goal of Article 102 TFEU is to safeguard the system of "undistorted competition" within the EU common market.28

2. When is the Price “Excessive”? 

As Section B.3 will demonstrate, the case law related to excessive pricing is quite limited. The debate on this issue has thus taken place at a rather “theoretical” level. In particular, economists have developed a number of tests that the NCAs should apply to verify when a price can be considered “excessive”.

Most of the economists share a sceptical view vis-à-vis the ability of the competition authority to effectively detect and sanction excessive pricing under Article 102 TFEU. Such a sceptical approach is due to two main concerns:29 first, the market might self-correct in the long term; secondly, sanctioning excessive pricing may negatively affect dynamic efficiencies. In a competitive market excessive prices normally last for only a limited period of time; in the long term, the high profits enjoyed by the dominant company will attract new entrants.30 Consequently, excessive pricing causes a self-adjustment of the market in the long term, and thus any intervention by the NCAs against excessive pricing runs the risk of false negative errors.31 According to Evans and Padilla, “consumers are best served with a policy that leaves firms, including dominant firms, free to charge prices above cost and earn positive and possibly high profits”.32 This assumption has been challenged by Ezrachi and Gilo, who argued that high prices imposed by the incumbent are not reason enough per se to encourage a new entrant to compete with the incumbent.33 According to the authors, a new entrant will primarily compare its marginal costs of production with those of the incumbent; only when its marginal costs are lower than those faced by the incumbent will the third party enter into the market.34 Despite the divergences concerning the likelihood that high prices

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28 In 2007, the CJEU referred in British Airways to its previous judgment in Continental Can and ruled that “Article 82 EC (now Art 102 TFEU) is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure”: Case C-95/04/P British Airways plc v Commission [2007] ECR I-02331, para 106.
31 Ibid.
32 Ibid, 4.
34 Ibid.
may attract new entrants, consensus exists on the fact that the NCA should sanction excessive prices when the relevant market is characterised by non-transitory entry barriers, which would impede new entries even in the long term (i.e., regulatory barriers which restrict the number of players in the markets).35

The second concern related to NCAs’ ability to sanction excessive pricing pertains to the possible negative effects of the NCA’s intervention on dynamic efficiencies. In particular, by sanctioning excessive prices, the NCA might undermine the incentives of the dominant company to invest in new products and technologies.36 This argument is nicely summarised in a well-known paragraph from the Trinko judgment:37

“Mere acquisition of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”

Taking into consideration the two concerns mentioned above, economists have elaborated different tests to assess when the NCA should intervene to sanction excessive pricing. According to Evans and Padilla, the NCA should intervene when three cumulative conditions are satisfied: (i) the company enjoys a monopoly or “super dominance” in the relevant market;38 (ii) prices are above the average total costs; and (iii) excessive pricing hinders the introduction of a new product into the market. Motta and De Streel proposed a similar threefold test, focused on the existence of super dominance and structural barriers which make entry unlikely.39 However, instead of referring to the introduction of a new product, the authors proposed the absence of an NRA as a third condition.40 According to the authors, NCAs should not sanction excessive pricing in regulated markets.

38 The concept of “super dominance” was described by Advocate General Fenelly as a “position of such overwhelming verging on monopoly”. According to the Advocate General, a position of super dominance would give rise to “particularly onerous obligations” for the dominant company. The concept of super dominance has never been openly recognised by the CJEU. Opinion of the Advocate General Fenelly in Compagnie Maritime Belge and others v Commission [2000] ECR I-1365, para 137.
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where tariffs are supervised and regulated by an NRA, since this would create a competence overlap between the NCA and the NRA.

To sum up, economists generally recognise that NCAs should only sanction excessive pricing under Article 102 TFEU in exceptional circumstances. However, there is no clear consensus in relation to the “test” that should be applied to decide in concrete cases whether the NCAs intervention against excessive prices is needed. As we shall see in the next section, the lack of consensus in the economic literature on how to approach excessive pricing is also reflected on the diverging approaches adopted by the CJEU, the EU Commission and the NCAs on this issue.

3. What is the Appropriate Standard of Review for Excessive Pricing: Lessons from the EU and Beyond

The CJEU recognised the possibility of sanctioning excessive pricing under Article 102 TFEU for the first time in General Motors.\(^{41}\) In that judgment, however, the Luxembourg Court did not clarify when the price imposed by a dominant undertaking should be considered excessive. The CJEU simply ruled that “an undertaking in a dominant position may abuse it by imposing a price which is excessive in relation to the economic value of the service provided”\(^{42}\).

In United Brands, the CJEU introduced a twofold test to verify when a price was excessive in comparison to the economic value of the product.\(^{43}\) In particular, the EU Commission was required by the Court to analyse the cost structure and then to compare the production costs with the price imposed in order to verify whether the profit margin of the dominant company was excessive.\(^{44}\)

Over the years, the CJEU has reiterated the United Brands test in a number of preliminary rulings requested by the national courts.\(^{45}\) However, as argued by Judge Wahl, these judgments often had a “declaratory nature”: the CJEU restated the United Brands test, but it left the duty to apply the test to the facts of the case to the national referring court.\(^{46}\) As recognised by the Court in United Brands, in fact, the analysis of the production costs may be extremely complex, particularly in relation to the estimation and allocation of fixed costs.\(^{47}\) Additionally, besides being difficult to apply, the cost–profit test would require the

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\(^{41}\) Case 26/75 General Motors Continental v Commission [1975] ECR 1367.

\(^{42}\) Ibid, paras 11, 12.

\(^{43}\) Supra n 1.

\(^{44}\) Ibid, paras 251–52.


\(^{46}\) Wahl, supra n 6, 54.

\(^{47}\) The analysis of some exclusionary practices also requires an analysis of the fixed and marginal production costs of the dominant company (ie predatory pricing and rebates). However, in the
EU Commission to assess the degree of profitability of the incumbent, an assessment which would be equivalent to a form of price regulation. Finally, the cost-profit test did not take into consideration the demand fluctuations. As noted by the European Commission in *Scandlines*, “customers are notably willing to pay more for something specific attached to the product/service that they consider valuable”.

Most of the EU Member States and candidate countries have transposed the text of Article 102 TFEU into their domestic competition rules. Consequently, the problem of definition of the applicable substantive standard for excessive pricing is common to all of these jurisdictions. Two well-known cases are worth mentioning, since they represent illustrative examples of the possible approaches adopted by the national courts and the NCAs in order to assess excessive pricing.

The first example is the *Napp* case, in which the UK Office for Fair Trade (OFT) sanctioned the pharmaceutical company Napps. The case involved aspects of both predatory and excessive pricing. Napp, in fact, sold its morphine products to doctors at excessive prices in order to recover the losses generated in supplying drugs to the British hospitals, which assigned contracts on the basis of a competitive tender. In relation to the analysis of excessive prices, the OFT developed a twofold test. Specifically, the OFT would sanction excessive pricing when: (i) the prices were “higher than what would be expected in a competitive market”; and (ii) there was no “effective competitive pressure to bring them down to competitive levels”. While the CJEU in *United Brands* required the EU Commission to compare only costs and prices, the OFT compared a plurality of elements, including Napp’s costs and prices vis-à-vis the costs and prices of its most profitable competitor. Furthermore, the OFT compared the prices applied by Napp in the domestic and export markets.

While the OFT’s decision in *Napp* was upheld by the UK Competition Appeal Tribunal, the judgment of the South African Competition Tribunal contest of exclusionary practices, the cost-price analysis is ancillary to the assessment of exclusionary behavior of the dominant company in the market.

48 This was the argument put forward by the Court of Appeal of England and Wales in 2007. The Court rejected the cost-profit test proposed by the ECJ in *United Brands*, arguing that “(Article 102 TFEU) is not a general provision for the regulation of prices”. *At the Races Limited v The British Horse Racing Limits and others*, England and Wales Court of Appeal (Civil Division), 2007 EWCA Civ 38, para 217.


51 Ibid.

52 Ibid, 8.

53 Ibid.
(SACT) in *Mittal Steel* was subsequently annulled by the South African Competition Appeal Court (SACAC). The interesting aspect of the case is that, even though Section 8 of the South African competition law was directly inspired by Article 102 TFEU, SACT rejected the cost–profit test developed by the CJEU in *United Brands*. SACT, in fact, developed an alternative “structural” approach: Mittal Steel enjoyed a super dominance in the relevant market and there was no likely entry in the future due to structural barriers; consequently, it was likely that the prices applied by Mittal Steel were excessive. SACT thus elaborated a test which “presumed” that Mittal Steel would engage in excessive pricing due to its market share and the characteristics of the relevant market. On appeal, SACAC rejected this approach, claiming that excessive pricing could be sanctioned only after a cost–profits analysis. The diverging views between SACAC and SACT show that different courts within the same jurisdiction might have different views on how excessive pricing should be analysed.

The preceding discussion demonstrates that neither the economists nor the competition law enforcers have managed to develop a uniform and straightforward test to analyse excessive pricing under Article 102 TFEU. In the absence of a clear substantive test, and in the view of the limited case law of the CJEU and the EU Commission, the NCAs of the new EU Member States and candidate countries have been left with little guidance in the complex process of developing their own standards to assess the exploitative conducts of the dominant companies. The ensuing section provides a comparative narrative of their experiences in this domain.

G. COMPARATIVE ANALYSIS OF THE CASES OF EXCESSIVE PRICES IN SELECTED NEW EU MEMBER STATES AND CANDIDATE COUNTRIES

1. Economic Sectors

As with any other form of anti-competitive unilateral practice, excessive pricing can be employed by the companies with an uncontested dominant position where such conduct could be viewed as exclusionary or exploitative. It would then be reasonable to assume that excessive prices will be spotted primarily

54 For a summary of the case see D Lewis, “Exploitative Abuses—a Note on the Harmony Gold v. Mittal Steel Excessive Pricing Case” in *International Antitrust Law and Policy* (Fordham University School of Law, 2009), ch 23.
55 Ibid.
in the highly concentrated or monopolistic economic sectors such as network industries and utilities, where the ownership of infrastructure or exclusive rights granted by the national or local authorities create uncontested dominance on the relevant market. A comparative analysis of the selected cases confirms this hypothesis. For example, in the electricity markets, where the consumption tariffs are typically approved and monitored by the NRAs, the dominant companies were prosecuted by the NCAs for imposing additional charges, such as reconnection fees,\(^{58}\) fees for issuing monthly invoices\(^{59}\) and additional charges for the installation of the ancillary equipment.\(^{60}\) In the telecommunications markets, the NCAs have investigated excessive prices used as a part of margin squeeze strategy,\(^{61}\) or as additional charges that should have been covered by the regulated tariffs.\(^{62}\) In the postal sector, the investigations targeted excessive prices applied in the provision of postal services\(^{63}\) and sales of postage stamps.\(^{64}\)

Excessive pricing strategies have been also spotted in those economic sectors where there was no state regulation of prices, but where the dominant undertakings were taking advantage of their ownership of essential facilities. In particular, the largest number of the infringement decisions concerned bus terminal services and funeral services linked to the management of cemeteries. In Bulgaria, Moldova, Montenegro and Serbia the bus terminal operators were imposing additional unjustified charges on the bus operators and passengers for ticketing and other ancillary services.\(^{65}\) In the case of funeral services in Bulgaria, Macedonia and Montenegro, the undertakings entrusted with the management of the municipal cemeteries were applying excessive prices for the access and usage of cemetery grounds and premises in order to discourage customers from using the optional funeral services offered by competitors or in order to raise the rivals’ costs and put them at a competitive disadvantage.\(^{66}\) In addition, the ownership of the essential facilities or exclusive rights which guaranteed the monopolistic position of the dominant undertaking led to the prosecution of the excessive pricing in sectors such as water supply (Bulgaria),\(^{67}\) airport catering (Croatia),\(^{68}\) quality certification (Croatia),\(^{69}\) petroleum storage

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\(^{58}\) Annex I, Case BG1.
\(^{59}\) Annex I, Case MK3.
\(^{60}\) Annex I, Case UA3.
\(^{61}\) Annex I, Cases BG2, BG6, MK5, BA1, BA2.
\(^{62}\) Annex I, Cases MK1, MK2, MK4.
\(^{63}\) Annex I, Case RO1.
\(^{64}\) Annex I, Case BG3.
\(^{65}\) Annex I, Cases BG5, BG7, MD1, MD2, ME4, RS1.
\(^{66}\) Annex I, Cases BG10, MK6, MK7, ME2, ME3.
\(^{67}\) Annex I, Cases BG4, BG9.
\(^{68}\) Annex I, Case HR1.
\(^{69}\) Annex I, Case HR2.
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The review of the economic sectors where the NCAs of the selected jurisdictions have prosecuted dominant companies for excessive pricing allows for identifying certain tendencies. In almost all the target countries excessive prices have been found in the network industries (telecoms, mobile telephony, postal services) and utilities sectors (water, electricity), which are often subject to price controls exercised by the NRAs. This finding is not surprising, particularly in the view of the structural and regulatory barriers which characterise these economic sectors. The NCAs’ interventions can also be explained by the social significance of those sectors, taking into account that excessive prices as an exploitative abuse have affected a large number of consumers. On the other hand, an interesting finding of the present case study is that the NCAs of the selected jurisdictions have also intervened outside of network industries, in sectors which should normally be subject to free competition. In particular, the NCAs of the new EU Member States and candidate countries have sanctioned the excessive pricing imposed by companies which acquired a monopolistic position due to an exclusive right granted by the state (ie transports, funeral services). To summarise the observed trends of intervention in the identified economic sectors, we submit that the NCAs have found excessive prices predominantly in markets with high entry barriers and low or even non-existent competition. The market barriers could have been created artificially as a result of state regulation and exclusive rights granted to the dominant undertakings (eg funeral services, utilities). They could also be caused by economic reasons, such as the importance of infrastructure in network industries (eg telecoms, electricity) or particular features of small economies where only a single provider of goods or services could viably operate in a particular market (eg bus terminal services).

2. Substantive Test

When it comes to determining whether a particular pricing strategy should be considered excessive or unfair, and can thus be prosecuted as an abuse of dominant position, the NCAs of the selected jurisdictions are left with little guidance from the EU. The United Brands test highlighted the importance of cost–profits analysis, which to a certain degree has been accepted in virtually all of the selected jurisdictions. Sometimes with direct reference to the United Brands precedent, the NCAs have engaged in the assessment of the cost structures...
of the dominant undertakings and investigated the relationship of the allegedly excessive prices to the identified costs.\textsuperscript{75} For example, the Bulgarian NCA employed linear price analysis in order to identify a potential margin squeeze strategy in the telecoms sector. In particular, the Bulgarian NCA compared the wholesale access price against the retail price for voice services for a set of calls varying in duration\textsuperscript{76} and established that the difference between the retail price and the wholesale price is often non-existent or negative.\textsuperscript{77} Similarly, the Croatian NCA rejected an abuse of dominance complaint when it established that a price increase in cement certification services was justified by the increased scope of testing activities mandated by the EU legislation.\textsuperscript{78} In Moldova, the NCA analysed the cost structure of a bus terminal operator in order to verify the justification of the advance sale fee added to the price of the ticket. This cost analysis allowed the NCA to conclude that such a fee was not based on any additional costs when compared to the ticket sales on the date of departure. As a result, the advance sale fee was labelled as abusive and the dominant undertaking was ordered to cease its application.\textsuperscript{79} In Albania, the NCA compared the profit margins of a dominant mobile phone operator with those present in competitive markets as part of its cost-profit analysis.\textsuperscript{80} Comparison with the prices and profit margins realised in the competitive markets has been routinely employed by the Ukrainian NCA, and has led to the prosecution of excessive prices for products ranging from bread\textsuperscript{81} to liquefied petroleum gas.\textsuperscript{82} All of the above examples demonstrate that the relationship between the price and the actual costs incurred by the dominant company has played an important role in determining excessive pricing.

It should be noted, however, that the cost-profit analysis was not always as structured and precise as suggested in the economic literature. In a number of cases, the price-setting mechanism employed by the dominant undertakings did not have any relationship to their cost structures. This finding alone was sufficient for the NCAs to label the applied prices as unfair or excessive. For example, the Bulgarian Supreme Administrative Court agreed with the NCA that the prices for the bus terminal services should not be based on the income of the customers (bus operators), which would amount to unfair and discriminatory pricing.\textsuperscript{83} Another category of cases where the NCAs established the

\textsuperscript{75} Annex I, Cases BG1, BG4, BG10, HR1, HR2, MD1, MD2, RO1, ME1, AL1, ME2, ME3.
\textsuperscript{76} The Bulgarian NCA analysed the prices of four sets of call: (i) intra-city calls terminated during the peak time zone; (ii) intra-city during off-peak; (iii) inter-city during peak; and (iv) inter-city during off-peak.
\textsuperscript{77} Annex I, Case BG6.
\textsuperscript{78} Annex I, Case HR2.
\textsuperscript{79} Annex I, Cases MD1, MD2.
\textsuperscript{80} Annex I, Case AL1.
\textsuperscript{81} Annex I, Case UA6.
\textsuperscript{82} Annex I, Case UA2.
\textsuperscript{83} Annex I, Case BG7.
existence of unfair prices concerned those cases where a pricing mechanism was partially used for exclusionary purposes, i.e., in order to raise the competitors’ costs and force them out of the market. In a Croatian case, an airport handling company was found to be in violation of the national equivalent of Article 102 TFEU when it imposed higher handling charges on the airlines using the competitors’ storage facilities. The Montenegrin NCA, on at least two occasions, held that a price increase applied to customers who were purchasing optional funeral services from competitors did not have any relationship to the actual costs and was therefore unfair or excessive.

Although not as widespread as the United Brands test, the structural approach to determination of excessive prices articulated in Mittal Steel is also present in the enforcement practice of the selected NCAs. In Macedonia, the NCA has developed a line of cases where voicemail charges imposed on callers by the mobile phone operators were labelled as exploitation and unjust enrichment. This conclusion was reached by the NCA because the callers did not have a choice while the clients of the mobile operators had also been charged for the voicemail service as a part of their subscription package. For the same reasons, the Macedonian NCA prosecuted telecoms and electricity incumbents for making their customers pay for the issuance and delivery of monthly bills.

The absence of economic justification as a way of shifting the burden of proof onto the concerned undertakings has also been spotted in the selected jurisdictions. For instance, the Bulgarian NCA used this approach in challenging the unfair pricing of TV programmes and bus terminal services. The Ukrainian NCA saw no economic justification for the higher prices charged for medicines sold in the city hospital than those marketed through the pharmacies.

Finally, the most straightforward way of prosecuting excessive pricing has been developed by the NCAs that were willing to intervene in the economic sectors under state price control exercised by the NRAs. In the most typical situations, the NCAs labelled as excessive the prices that exceeded regulated tariffs or additional charges that were already covered by the regulated tariffs. For example, the Bulgarian NCA reasoned its finding of excessive pricing in the markets for postage stamps and water by the fact that the applied prices exceeded the maximum tariffs set in the sector specific regulations.

84 Annex I, Case HR1.
85 Annex I, Cases ME2, ME3.
86 Annex I, Cases MK1, MK2.
87 Annex I, Cases MK3, MK4.
88 Annex I, Case BG5.
89 Annex I, Case BG7.
90 Annex I, Case UA5.
91 Annex I, Case BG6.
92 Annex I, Case BG9.
The Ukrainian NCA went against dominant companies applying prices that exceeded the regulated tariffs in the markets for building maintenance services,93 electricity,94 medical95 and veterinary96 certifications. The Montenegrin NCA went even further and prosecuted the dominant bus operator for charging higher ticket prices than were agreed upon in the transport services contract concluded with the local administration.97

The empirical study showed that the NCAs of the selected jurisdictions referred to different standards in their analysis of the excessive pricing. The cost–profit analysis suggested by the CJEU in United Brands was not the only substantive test followed by these NCAs: consideration of welfare justice and the structural approach developed in Mittel Steel have also been applied as substantive tests. It can be stated that the observed enforcement practices in the selected jurisdictions demonstrated that eventually, in all cases where the excessive pricing was at issue, the NCAs have considered the economic justification of the applied prices (ie their relationship to the cost structure of the dominant undertaking). The consideration of the economic justification, however, differed significantly from country to country, causing inconsistent enforcement which has hampered legal certainty. Although some consideration of the costs is present in all jurisdictions, the scope and complexity of the economic analysis required by the NCAs to support their findings has varied. Moreover, the set of prima facie evidence that shifted the burden of proof (ie concerning the existence of economic justification) onto the undertakings concerned also differed. This fact made it more difficult for the dominant undertakings to defend their pricing strategies in particular jurisdictions.

3. Remedies

When identifying the types of remedies selected by the NCAs as a tool for preventing and correcting excessive prices, one should keep in mind that the selected jurisdictions may differ with regard to the powers of the NCAs to impose remedies. For instance, unlike the new EU Member States, the candidate countries and potential candidates have only relatively recently entrusted their NCAs with direct sanctioning powers. One should also distinguish between the sanctioning powers of the NCAs (to impose monetary fines)98 and their ability

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93 Annex I, Case UA1.
94 Annex I, Case UA3.
95 Annex I, Case UA4.
96 Annex I, Case UA7.
97 Annex I, Case ME4.
98 While in the majority of the jurisdictions covered by the present research the NCAs are authorised to impose fines calculated as a percentage of the annual turnover of the undertaking(s) concerned, there are some notable exceptions. In Montenegro, under the law that was in force until 8 October 2012, the antitrust fines were expressed as multiples of “minimum wages” or as a percentage of illegal profits obtained as a result of the infringement. In Moldova, the NCA
to affect the conduct of the undertakings concerned by imposing behavioural remedies or changing the structure of the relevant market by ordering the divestitures. Finally, one should keep in mind that even the NCAs having identical sanctioning and remediying powers may display significant divergence in the application of those powers, due to the inherent discretion in formulating their own enforcement priorities. With the above caveats in mind, we shall proceed with the review of the remedies applied by the selected NCAs in the excessive pricing cases.

The most common combination of remedies observed was the imposition of fines in conjunction with an order to cease the application of the excessive prices. However, sometimes the NCAs went further, and crafted certain behavioural remedies aimed at preventing such excessive pricing in the future. In the Zagreb airport catering services case, for instance, the Croatian NCA ordered the handling company to modify its prices so as to reflect the actual costs and apply them in a transparent, objective and non-discriminatory manner. The new prices had to be approved by the NCA. In Macedonia, the NCA has been more specific and fixed the “reasonable” price levels in its infringement decision against an incumbent telecoms supplier. In order to prevent margin squeeze practices, the Macedonian NCA insisted that wholesale prices for lease of digital lines to third-party providers should be at least 30% lower than those on the retail level applied to the final customers of the dominant operator. In Montenegro, the NCA has decided to engage in continuous monitoring of the dominant undertaking’s conduct. The owner of a maritime petroleum depot was ordered to set cost-based prices and, for a period of two years, to notify the NCA about any new customers requesting the usage of storage capacities. At times, the NCAs have also involved other state authorities in...
the monitoring of the imposed remedies. Thus, in a case concerning building maintenance services, the Ukrainian NCA ordered the dominant undertaking to fit its service fees within the limits allowed by the legislation, and submit the modified fees for approval by the local administration.\footnote{Annex I, Case UA1.}

As argued by Lyons, economists usually recognise that fines are ineffective as a remedy against excessive pricing.\footnote{Supra n 35.} In fact, private companies have a natural tendency to increase prices in order to maximise profits when they enjoy a monopoly position in the market. Consequently, a fine will not dissuade the dominant company from increasing prices. Similarly, the effectiveness of a behavioural remedy should also be questioned: by imposing a behavioural remedy, the NCA will de facto subject the incumbent to an additional form of regulation. In addition, the NCA will bind itself to a long-term monitoring task. The monitoring duty can be particularly cumbersome for a newly established NCA affected by limited human resources.\footnote{M Botta, “Merger Remedies Imposed by the Competition Authorities of the Emerging Economies” (2011) 34(2) World Competition 321.} Structural remedies could be more effective in eliminating the structural barriers which restrict competition in the market. However, the NCAs of the selected jurisdictions have not imposed structural remedies to solve abuses of dominance related to excessive pricing in any of the analysed cases. This was due to the fact that these institutions either lacked the competence under their national competition laws to impose structural remedies or lacked the political strength necessary to impose a structural remedy.

4. Judicial Review

Judicial review of the decisions adopted by the NCA is present in the competition laws of all of the selected jurisdictions. The most common form of judicial review is carried out by the administrative court specialised in reviewing the decisions of the state authorities.\footnote{Bulgaria (Supreme Administrative Court, http://www.sac.government.bg/), Croatia (High Administrative Court, http://www.upravnisudhr.hr/), Republic of Macedonia (Administrative Court, http://www.uskokje.mk/) and Serbia (Administrative Court, http://www.up.sud.rs/). The websites were last accessed on 12 September 2012.} In some of the jurisdictions covered by this research, the review of the NCAs decisions is carried out by the regular courts,\footnote{Albania (District Court of Tirana, http://www.ggykatirana.gov.al/), Bosnia and Herzegovina (Court of Bosnia and Herzegovina, http://www.sudbih.gov.ba/) and Romania (Bucharest Court of Appeals, http://www.cab1864.eu/). The websites were last accessed on 12 September 2012.} while, in those countries where the NCAs do not have direct sanctioning powers, the general courts conduct the judicial procedure leading to the
determination of the penalty for competition infringement.\textsuperscript{110} The selected data are far from conclusive because the judicial precedents on excessive pricing have been identified in only two jurisdictions out of total of ten: Bulgaria and Macedonia. The absence of court decisions in the other selected jurisdictions can be explained either by the fact that the relevant judgments have not been made publicly accessible or that the courts have not reviewed the excessive pricing decisions rendered by the NCAs.

In Bulgaria, the NCAs’ infringement decisions in the field of excessive pricing have been the subject of intense judicial scrutiny by the Supreme Administrative Court (SAC). In a number of cases, the SAC reviewed the substantive test applied by the NCA in determining the “excessiveness” of the prices imposed by the dominant companies. Although the court did not exhibit any preference for a particular substantive test, it verified the consistency of its application and the evidentiary support provided by the NCA. Thus, the SAC upheld the NCAs’ decisions where the excessive prices were determined on the basis of a cost–profit test,\textsuperscript{111} the absence of economic justification\textsuperscript{112} and deviation from the tariffs set by the NRA.\textsuperscript{113} At the same time, regardless of the test chosen by the NCA, the SAC quashed the infringement decisions where the economic analysis of the alleged excessive prices was lacking.\textsuperscript{114} The SAC also considered the presence of the NRA as a factor that should restrain the NCAs’ intervention. In two cases concerning electricity and telecoms sectors, the SAC annulled the NCAs’ interventions in price regulation exercised by the respective NRAs.\textsuperscript{115}

Macedonia represents a different example of judicial control, where the courts (the Administrative Court and the Supreme Court) have focused their review predominantly on the procedural aspects of the NCAs’ investigations and formal elements of the NCAs’ infringement decisions. A typical Macedonian scenario of judicial review is as follows: (i) the Administrative Court quashes the NCAs’ infringement decision for procedural irregularities (for example, the NCA fails to mention the exact duration of the infringement); (ii) the NCA remedies the procedural irregularities and adopts the repeated decision, which addresses the comments of the court; (iii) the Administrative Court rejects the appeal of the parties against the second decision where no procedural irregularities are found; and (iv) the Supreme Court upholds the judgment of the Administrative Court where no procedural irregularities are found.\textsuperscript{116} As a

\textsuperscript{110} This was the case in Moldova under Law No 1103/2000 on protection of competition. The recently adopted Law No 183/2012 on protection of competition provides for direct imposition of fines by the NCA. Svetlicinii, supra n 13.

\textsuperscript{111} Annex I, Cases BG4, BG6, BG7.

\textsuperscript{112} Annex I, Cases BG3, BG7.

\textsuperscript{113} Annex I, Cases BG8, BG9.

\textsuperscript{114} Annex I, Case BG5.

\textsuperscript{115} Annex I, Cases BG1, BG2.

\textsuperscript{116} Annex I, Cases MK1, MK2, MK3, MK4.
result, the substantive test and economic analysis of the NCA remained outside the courts’ attention.

As already stated, the study has identified the judicial control of the excessive pricing decisions only in two out of ten target jurisdictions. The Bulgarian and Macedonian jurisprudence represent two different examples of the role and influence of the judiciary on the development of the enforcement practice in the field of excessive pricing. In Bulgaria, the NCAs decisions have been subject to substantive judicial review, which has tested the validity of the economic analysis and substantive standards applied by the NCA. The Bulgarian jurisprudence has also delineated the competences of the NCAs and NRAs in relation to the regulation of prices. The Macedonian experience provides a different picture. In this jurisdiction, the attention of the courts has primarily been focused on the procedural aspects of the NCAs investigations and the formal elements of the infringement decisions. As a result, the Macedonian NCA remained largely unrestrained in the formulation of its enforcement standards and continued its interventions into the regulated sectors, as the ensuing section demonstrates. These considerations suggest that the importance of the courts in shaping the enforcement practices and standards applied by the NCAs in the area of excessive prices should not be underestimated. The Bulgarian jurisprudence on this subject demonstrates that the judicial review can be an important factor in formulating the substantive test and ensuring the quality of the NCAs economic assessment, which is inherent in the application of the cost-based test.

5. Presence of the Sector Regulator

The above review of the economic sectors where the NCAs investigated the application of excessive pricing by the dominant undertaking demonstrated that almost half of the respective infringement decisions were adopted in relation to the sectors where sector-specific regulations were enforced by the NRAs. Sector regulation often included price regulation in the form of price formulae, maximum profit margins, maximum level of tariffs or fixed tariffs. The presence of the sector regulator has obviously not prevented the NCAs from intervening with the price-setting process of the dominant undertakings. It is beyond the narrow scope of the present research to examine the degree of state regulation in particular economic sectors and the functionality of the NRAs in the selected jurisdictions. Instead, our comparative study was focused exclusively on the approach adopted by the NCAs when prosecuting excessive prices. In this section we discuss the tendencies observed in the approach used by the NCAs in relation to the existence of sector-specific regulations, such as

117 Annex I, Cases BG1, BG2, BG4, BG6, BG8, BG9, MK1, MK2, MK3, MK4, MK5, AL1, BA1, BA2, UA1, UA3, RS2.
price control, exercised by the NRAs and their correlation with the enforce-
ment of competition rules exercised by the NCAs.

In virtually all of the researched jurisdictions the enforcement of competition rules runs parallel to the regulatory powers exercised by NRAs in the recently liberalised network industries. The NCAs normally exercise significant discretion in formulating their enforcement priorities, which leads to certain heterogeneity in the NCAs’ approaches towards sector regulation. As a rule, the NCAs are not formally prohibited from intervening in sectors covered by sector regulations. However, the presence of the NRA has often affected the NCAs’ decision when conducting its analysis and imposing the remedy against excessive pricing.

In Bulgaria, the existence of sector regulation exercised by the NRA served as a ground for the annulment of the NCAs’ decisions in the electricity and telecommunications sectors.118 In the water supply and postal services sectors, the Bulgarian NCA conducted its price assessment based on the tariffs set by the NRA.119 The Ukrainian NCA acted in a similar manner when it established the existence of excessive prices in the building maintenance and electricity markets.120 Finally, the Serbian NCA proved to be the most “sensitive” to sector regulation when it suspended its investigation into the alleged excessive pricing on the cable TV market due to the fact that the NRA had already acted by attributing to the dominant undertaking the SMP (significant market power) status and established a price monitoring mechanism.121

The Macedonian NCA followed the opposite approach and handed down its unfair pricing decisions in the telecoms and electricity sectors with little or no deference to the regulatory framework.122 The Albanian NCA demonstrated more regard to the sector regulation and, in its decision establishing excessive prices in the mobile telephone market, it recommended that the NRA take immediate measures for the liberalisation of the relevant market.123 In Bosnia & Herzegovina, the NCA demonstrated its deference to the NRA in a more indirect way by using procedural tools (expiration of the mandatory period for the adoption of the infringement decision) to avoid ruling on the alleged margin squeeze practices of the incumbent telecoms operators.124

As argued by Nietsche and Wiethaus, the NCA should not sanction excessive pricing in the sectors where an NRA is present.125 This suggestion aims at

118 Annex I, Cases BG1, BG2.
119 Annex I, Cases BG4, BG8, BG9.
120 Annex I, Cases UA1, UA3.
121 Annex I, Case RS2.
122 Annex I, Cases MK1, MK2, MK3, MK4.
123 Annex I, Case AL1.
124 Annex I, Cases BA1, BA2.
125 R Nietsche and L Wiethaus, “Competition Law in Regulated Industries: On the Case and Scope for Intervention” (2012) 3(4) Journal of European Competition Law and Practice 409. The authors suggest the following three criteria, which help to distinguish cases that qualify for ex
avoiding an overlap between the NCAs and NRAs enforcement activities. This study has shown that not all the NCAs of the new EU Member States and candidate countries have followed this recommendation, by often sanctioning excessive pricing in the regulated sectors. This is a clear sign of the lack of coordination between NCAs and NRAs in the selected jurisdictions.

D. CONCLUDING REMARKS

The comparative study of the selected jurisdictions highlights certain tendencies in the application of competition rules for prosecution of excessive prices. While the EU Commission has been reluctant to enforce Article 102 TFEU against excessive pricing, the relatively young NCAs in new EU Member States and candidate countries have not hesitated to apply the domestic equivalents of this provision in order to prosecute dominant undertakings for taking advantage of their market position and charging their customers excessive or unfair prices. Although this paper did not aim to conduct a comprehensive analysis of the enforcement record against excessive pricing in the target jurisdictions, it has generated empirical data which shows the existence of a trend: contrary to the priorities of the EU Commission, the NCAs of new EU Member States and candidate countries are willing to prosecute excessive pricing. It remains to be seen whether this trend will be short lived as the NCAs accumulate knowledge, experience, and better coordination with the NRAs.

As argued in Section B.1, the original focus of Article 102 TFEU was likely to be on exploitative abuses; the NCAs of the new EU Member States and candidate countries thus seem to have rediscovered the “original spirit” of Article 102 TFEU. The decision to sanction the excessive pricing under the domestic equivalents of Article 102 TFEU, therefore, is not an illegitimate choice per se. However, it can be observed that the NCAs in these countries have enforced the respective provisions of their competition laws in a rather inconsistent manner. Although the NCAs have shown willingness to sanction excessive pricing as an abuse of dominant position, they have received little external guidance on how to do so.

In 2009, the EU Commission adopted its Guidance Paper on “enforcement priorities” for applying Article 102 TFEU to exclusionary practices. In view

\[post\text{ \ intervention by the NCA in regulated sectors: (i) if the regulatory approach covering the goods or services related to the competition complaint appear effective, then ex \text{ \ post\ intervention is less likely to be helpful; (ii) if the complaint relate to goods or services which, if the competitive issue were resolved, enable effective competition, then ex \text{ \ post\ intervention is more likely to be helpful; and (iii) if the complaint relate to goods or services which are tightly intertwined with other regulated goods or services, then ex \text{ \ post\ intervention is less likely to be helpful.}\]

126 European Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009]
of the limited number of decisions adopted by the EU Commission sanctioning excessive pricing, the fact that the Guidance Paper refers exclusively to exclusionary practices is not surprising. However, even though the EU Commission is reluctant to enforce Article 102 TFEU against excessive pricing, it should consider adopting similar guidelines covering exploitative conduct such as excessive pricing. In a decentralised competition law enforcement system, the guidelines adopted by the EU Commission on this subject should be welcome in order to ensure consistent competition law enforcement throughout the EU, as well as in the countries with accession prospects.

The EU Commission’s guidelines are aimed at providing legal certainty to private companies by offering an overview of the DG Competition’s previous decisions and CJEU’s case law in relation to a specific aspect of competition law enforcement. In spite of the limited case law in this sector, the EU Commission should adopt guidelines which would clarify when it would be appropriate for an NCA to sanction excessive pricing. In particular, the EU Commission should go beyond the restatement of the United Brands cost–price test; DG Competition should explain the difficulties encountered in enforcing this test (i.e., lack of consideration of the demand fluctuations). In addition, the EU Commission should provide an overview of the economic debate on this issue; in particular, it should explain the economists’ main concerns concerning the enforcement of Article 102 TFEU against excessive pricing (i.e., that NCA intervention might be not necessary due to the self-adjustment of the market in the long term; the intervention might hamper dynamic efficiencies). However, the EU Commission should also clarify the “test” to determine when the NCA should investigate excessive pricing under Article 102 TFEU (by referring, for instance, to the tests elaborated by Motta–De Streele and Evans–Padilla).

In the absence of a comprehensive public discussion on this subject, it would be premature to recommend further substantive rules that should find their way into future guidelines. The important aspect to bear in mind is that the guidelines should not simply be reactive (i.e., reflecting the existing EU Commission and CJEU case law on this issue) but, rather, proactive. In the decentralised system of competition law enforcement, the EU Commission should proactively ensure that the NCAs of the new EU Member States and candidate countries enforce EU competition rules in a consistent manner. The proactive role of the prospective guidance would require a broad debate among different stakeholders, as well as consideration of the diverging economic realities of the current and future EU Member States.
### Annex I: Comparative Table of the NCAs’ Decisions

<table>
<thead>
<tr>
<th>Country/Case number</th>
<th>Economic sector</th>
<th>Type of abuse</th>
<th>Substantive test</th>
<th>Remedies</th>
<th>Judicial review</th>
<th>Presence of NRA</th>
</tr>
</thead>
<tbody>
<tr>
<td>BG1 1142/16 December 2008</td>
<td>Electricity</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>Fine</td>
<td>Annulled</td>
<td>Yes</td>
</tr>
<tr>
<td>BG2 624/23 June 2009</td>
<td>Telecom</td>
<td>Margin squeeze</td>
<td>Costs test</td>
<td>Fine</td>
<td>Annulled</td>
<td>Yes</td>
</tr>
<tr>
<td>BG3 331/28 December 2006</td>
<td>Cable TV</td>
<td>Unfair pricing</td>
<td>Absence of justification</td>
<td>Upheld</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>BG4 680/17.07.2008</td>
<td>Water</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>No infringement found</td>
<td>Upheld</td>
<td>Yes</td>
</tr>
<tr>
<td>BG5 820/27 September 2007</td>
<td>Bus terminal services</td>
<td>Unfair pricing</td>
<td>Costs test</td>
<td>Upheld</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>BG6 210/28 September 2006</td>
<td>Telecom</td>
<td>Unfair pricing</td>
<td>Costs test</td>
<td>Upheld</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>BG7 139/27 June 2006</td>
<td>Bus terminal services</td>
<td>Unfair pricing</td>
<td>Absence of justification, costs test</td>
<td>Upheld</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>BG8 110/26 June 2003</td>
<td>Postage stamps</td>
<td>Excessive pricing</td>
<td>Price regulation</td>
<td>No infringement found</td>
<td>Upheld</td>
<td>Yes</td>
</tr>
<tr>
<td>BG9 34/02 March 2004</td>
<td>Water</td>
<td>Excessive pricing</td>
<td>Price regulation</td>
<td>Upheld</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>BG10 46/08 February 2007</td>
<td>Funeral services</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>Fine</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>HR1 UP/1/03/1-02/2007-01/15/30 December 2008</td>
<td>Airport catering</td>
<td>Excessive prices</td>
<td>Costs test</td>
<td>Order to modify and notify</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>HR2 580-02-2011-63-021/13 October 2011</td>
<td>Quality certification</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>No infringement found</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>MK1 09-86/3/15 February 2000</td>
<td>Mobile telephony</td>
<td>Abusive charges</td>
<td>Exploitation of consumers</td>
<td>Fine</td>
<td>Annulled, Yes upheld</td>
<td></td>
</tr>
<tr>
<td>MK2 09-14/1/15 February 2000</td>
<td>Mobile telephony</td>
<td>Abusive charges</td>
<td>Exploitation of consumers</td>
<td>Fine</td>
<td>Annulled, Yes upheld</td>
<td></td>
</tr>
<tr>
<td>MK3 09-133/4/21 March 2008</td>
<td>Electricity</td>
<td>Abusive charges</td>
<td>Exploitation of consumers</td>
<td>Fine</td>
<td>Annulled, Yes upheld</td>
<td></td>
</tr>
<tr>
<td>MK4 07-40/14/28 June 2007</td>
<td>Telecom</td>
<td>Abusive charges</td>
<td>Exploitation of consumers</td>
<td>Fine</td>
<td>Upheld, Yes</td>
<td></td>
</tr>
<tr>
<td>MK5 07-50/1/26 January 2009</td>
<td>Telecom</td>
<td>Margin squeeze</td>
<td>No margin left for rivals</td>
<td>Fine and order to preserve 30% difference between wholesale and retail</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>MK6 09-189/10/28 June 2007</td>
<td>Funeral services</td>
<td>Excessive pricing</td>
<td></td>
<td></td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>MK7 07-92/10 December 2008</td>
<td>Funeral services</td>
<td>Excessive pricing</td>
<td></td>
<td></td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>MD1 9-11/53/13 May 2011</td>
<td>Bus terminal services</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>Order to cease</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Ref</th>
<th>Date</th>
<th>Sector</th>
<th>Pricing Issue</th>
<th>Test Method</th>
<th>Market Impact</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>MD2</td>
<td>10-11/113/03 November 2011</td>
<td>Bus terminal services</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>Order to cease</td>
<td>No</td>
</tr>
<tr>
<td>RO1</td>
<td>52/2010/16 December 2010</td>
<td>Postal services</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>Order to cease and notify new prices</td>
<td>No</td>
</tr>
<tr>
<td>ME1</td>
<td>01-I-UP-10-1911/19.07.2011</td>
<td>Petroleum storage</td>
<td></td>
<td>Costs test</td>
<td>To announce prices, notify NCA for 2 years</td>
<td>No</td>
</tr>
<tr>
<td>AL1</td>
<td>59/09 November 2007</td>
<td>Mobile telephony</td>
<td>Excessive pricing</td>
<td>Costs test, comparison with competitive markets</td>
<td></td>
<td>Yes</td>
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<tr>
<td>BA1</td>
<td>05-26-2-028-76-II/10/12 October 2011</td>
<td>Telecom</td>
<td>Margin squeeze</td>
<td>No infringement found</td>
<td>Yes</td>
<td></td>
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<tr>
<td>BA2</td>
<td>01-05-26-028-63-II/2009/04 November 2010</td>
<td>Telecom</td>
<td>Margin squeeze</td>
<td>No infringement found</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>ME2</td>
<td>02-UP1-11/6/11 June 2012</td>
<td>Funeral services</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>Order to cease</td>
<td>No</td>
</tr>
<tr>
<td>ME3</td>
<td>01-UP1-49/19-11/15 March 2011</td>
<td>Funeral services</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>Order to cease</td>
<td>No</td>
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<td>ME4</td>
<td>01-UP1-41/39-11/06 May 2011</td>
<td>Bus passenger transport</td>
<td>Excessive pricing</td>
<td>Price regulation</td>
<td>No</td>
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<td>UA1</td>
<td>19-01/2009/28 May 2009</td>
<td>Building maintenance</td>
<td>Excessive pricing</td>
<td>Price regulation, Fine, order to cease and notify</td>
<td>Yes</td>
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<tr>
<td>UA2</td>
<td>annual report for 2011</td>
<td>LPG</td>
<td>Excessive pricing</td>
<td>Costs test, comparison with competitive market</td>
<td>Fine</td>
<td>No</td>
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<tr>
<td>UA3</td>
<td>annual report for 2011</td>
<td>Electricity</td>
<td>Abusive charges</td>
<td>Exploitation of consumers</td>
<td>Fine, order to cease</td>
<td>Yes</td>
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<tr>
<td>UA4</td>
<td>annual report for 2011</td>
<td>Medical certification</td>
<td>Excessive pricing</td>
<td>Costs test, comparison with competitive market</td>
<td>Order to cease</td>
<td>No</td>
</tr>
<tr>
<td>UA5</td>
<td>annual report for 2011</td>
<td>Medicines</td>
<td>Excessive pricing</td>
<td>Absence of justification</td>
<td>Fine, order to cease</td>
<td>No</td>
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<tr>
<td>UA6</td>
<td>annual report for 2011</td>
<td>Bread</td>
<td>Excessive pricing</td>
<td>Costs test, comparison with competitive market</td>
<td>Fine</td>
<td>No</td>
</tr>
<tr>
<td>UA7</td>
<td>annual report for 2011</td>
<td>Veterinary certification</td>
<td>Abusive charges</td>
<td>Exploitation of consumers</td>
<td>Fine</td>
<td>No</td>
</tr>
<tr>
<td>RS1</td>
<td>25 January 2007</td>
<td>Bus terminal services</td>
<td>Excessive pricing</td>
<td>Costs test</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>RS2</td>
<td>5/0-03-0003/07-13/22 March 2007</td>
<td>Cable TV</td>
<td>Excessive pricing</td>
<td>No infringement found</td>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>